From: Matthew Coughlin
To: Microsoft ATR
Date: 1/25/02 3:15am
Subject: Microsoft Settlement

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To: Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW
Suite 1200
Washington, DC 20530-0001

As a software engineer and a US citizen, I wish to comment on the following
aspects of the proposed Microsoft settlement:

Lack of a meaningful punishment

The settlement in the US v. Microsoft anti-trust trial lacks any form of
meaningful punishment for Microsoft's past illegal behavior. There is no
fine or structural remedy being imposed on Microsoft that discourages them
or other companies from engaging in such activities.

The only clear penalty for non-compliance by Microsoft during the 5-year
probationary period is an additional 2 years of probation. There are no
obvious penalties for further non-compliance by Microsoft during the 5-year
period or during the 2-year extension. This offers Microsoft no meaningful
incentive to restrict or modify their future business practices.

IV.B.10. "No member of the TC [Technical Committee] shall make any public
statements relating to the TC's activities."

IV.B.9. "Each TC member [...] shall sign a confidentiality agreement
prohibiting disclosure of any information obtained in the course of
performing his or her duties as a member of the TC [...] to anyone other
than Microsoft, the Plaintiffs, or the Court."

The Technical Committee (TC), designed to ensure that Microsoft complies
with the behavorial restrictions during their 5- to 7-year probationary
period, has a public gag order, preventing them from reporting any illegal
business practices to the general public.

IV.B.3. "the Plaintiffs as a group and Microsoft shall each select one
member of the TC, and those two members shall then select the third member"

Microsoft chooses 1 of the 3 members of the Technical Committee, and the
person they choose has a say in choosing 1 of the other 2, allowing
Microsoft to control a majority of the Technical Committee. Why should
Microsoft be allowed to have a say in even a single member of a Technical
Committee that's designed solely for the purpose of policing them?

Recurring theme of Microsoft setting the terms of their own conduct
restrictions

Why is it that Microsoft, a convicted illegal monopolist, and one with a
history of disregarding a prior consent decree, is being allowed to define
the restrictions on their conduct? How would the public react if convicted
thieves and murderers were allowed to decide for themselves the
restrictions on their conduct? Why should it be any different in the
business world?

III.J.2. "third-party verification, approved by Microsoft, to test for and

ensure verification and compliance with Microsoft specifications for use of the API or interface"

If the third-party verification has to be approved by Microsoft, and if it's based on Microsoft's own specifications, then Microsoft effectively controls the verfication process; they can abritrarily assign whatever specifications they choose, whether or not the specifications are relevant and necessary for the API or interface. They could establish a verification process that no company or entity would be able to pass successfully, thereby allowing them to avoid disclosing APIs, Documentation, and Communications Protocols to any company or entity.

III.C.2. "provided that the OEM complies with reasonable technical specifications established by Microsoft"

If Microsoft is allowed to determine the technical specifications, as well as what constitutes "reasonable" technical specifications, then they are free to arbitrarily make their technical specifications as restrictive and prohibitive towards their competitors as they see fit. They could effectively exclude all of their competitors.

III.J.1. "No provision of this Final Judgment shall require Microsoft to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria"

If Microsoft claims that an area of their code base has any functionality related to security, Microsoft does not have to provide the APIs, Documentation, and Communication Protocols for that area. As such if Microsoft adds or claims to add security-related functionality to every area of their code base, they would not have to provide APIs, Documentation, and Communication Protocols for any area of their code base.

III.D. "via the Microsoft Developer Network ("MSDN") or similar mechanisms"

Why do the architectural mechanisms have to be similar to MSDN? Who determines what constitutes "similar mechanisms"?   This presents a barrier to entry for any architecture that is not closely modeled after MSDN, and potentially presents a barrier to entry for all non-MSDN architectures.

III.D. "In the case of a new major version of Microsoft Middleware"

Who decides what constitutes a major version? What if Microsoft officially refers to all future releases of their Middleware as minor versions, or what if they use some terminology other than "major version"? What if Microsoft stops officially distinguishing different versions of middleware - which may conceivably happen once they move their software to a subscription model?

III.D. "obligations imposed by this Section III.D shall occur in a Timely Manner"

Is Microsoft free to decide for themselves what constitutes a "timely manner"? Can they arbitrarily choose any amount of time as they see fit?

The settlement does not address open-source software and non-profit organizations.

III.J.2. "has a reasonable business need", "meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business"

If the business-viability standards are established by Microsoft, then Microsoft has free reign to arbitrarily choose for itself what companies or entities are entitled to their APIs, Documentation, and Communications Protocols.

Microsoft would likely exclude any company or entity that is not intending to make money directly off the usage of their software. This would allow them to exclude most open-source software projects and non-profit organizations.

Furthermore, if Microsoft decides that for a company or entity to have a viable business the company or entity must not be competing against them, then they could exclude all of their competitors.

III.J.2. "willful violation of intellectual property rights"

Microsoft has previously defined the GNU General Public License (GPL) as an "intellectual property destroyer". If Microsoft is allowed to determine what constitutes "willful violation of intellectual property rights", then by their definition of the GPL, any company or entity that uses or supports GPL software engages in willful violation of intellectual property rights; thus, Microsoft would not have to disclose APIs, Documentation, or Communications Protocols to any company or entity that uses any GPL software.

The settlement does not address OEMs that provide computers without a Windows Operating System Product.

III.A.2. "shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System"

What about shipping a computer with a single non-Windows Operating System Product? The above section does not prevent Microsoft from retaliating against an OEM if the OEM provides some computers that have only a single non-Windows Operating System Product on them.

III.C.1. Offering users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product.

What about providing a computer without a Windows Operating System Product? The above section does not prevent Microsoft from restricting OEM licenses if the OEM provides some computers that do not have a Windows Operating System Product on them.

The settlement does not address the disclosure of file formats.

One of the strongest monopolies Microsoft is able to leverage is that of their Office file formats. Without full disclosure of file formats, Microsoft can continue to extend the existing barriers to entry in the office software space, by using the Digital Millennium Copyright Act (DMCA)

to create file formats that cannot be legally reverse-engineered.

Worse than doing nothing, the settlement appears to legalize Microsoft's
business practices

After Ronald Reagan took office for his first term as president, the US
Department of Justice (DOJ) dropped the running anti-trust case which had
been made against IBM by the previous administration(s). While G.W. Bush
was running for president, he made it clear that he would side with
Microsoft on their anti-trust case, by saying he would "favor innovation
over legislation", echoing Microsoft's own PR line about the trial. With
the precedent having been set by Reagan, it seemed certain that the US DOJ
would drop the anti-trust case against Microsoft if G.W. Bush were elected
president.

Rather than dropping the anti-trust case, the DOJ has chosen to pursue a
settlement that puts on the appearance of reasonable punishment, while
allowing Microsoft to determine what restrictions they must abide by. This
brings the risk of effectively legalizing Microsoft's business practices,
so long as their actions don't conflict with the behavioral restrictions
imposed by the settlement - the restrictions that Microsoft themselves
determined.

Significantly threatens the credibility of the US justice system

Microsoft and other companies, as well as the general public, are being
given the message that the government will tolerate illegal business
practices from companies that are able to wield sufficient financial,
political, and public relations might. Is this the message that the US
justice system should send to the public?

Sincerely,

Matthew Kendall Coughlin
2701 Brommer Street
Santa Cruz, CA 95062
USA

Software Engineer